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# Defining Disputes and Characterizing Claims: Subject-matter jurisdiction in UNCLOS Litigation

James Harrison\*

## 1. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) is considered to be one of the most important law-making treaties of the twentieth century.<sup>1</sup> As well as clarifying the key rules and principles that define maritime jurisdiction, it is also notable for containing a compulsory dispute settlement system in Part XV, which allows most disputes to be submitted to binding adjudication or arbitration.<sup>2</sup> All states must accept this dispute settlement system when they become a party to the Convention and it has been described by one author as ‘the cement which holds the whole structure together and guarantees its continued acceptability and endurance for all parties.’<sup>3</sup>

Central to the dispute settlement system established in Part XV is Article 286, which acts as a compromissory clause.<sup>4</sup> This provision is important because it provides the consensual basis for dispute settlement.<sup>5</sup> It is this expression of consent that allows a court or tribunal to deliver a binding determination of a dispute. Yet, the ability to bring a claim under UNCLOS is not unconditional and jurisdiction is limited *ratione temporis*, *ratione loci*, *ratione personae*, and *ratione materiae*.<sup>6</sup> It is the latter category of limits that is addressed in this paper.

Jurisdiction *ratione materiae* is concerned with the subject-matter of the dispute. In this respect, the Convention simply provides that ‘a court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation and application of this Convention, which is submitted to it in accordance with this Part.’<sup>7</sup> This simple language hides a number of hurdles that must be crossed by a wannabe litigant before it can get a decision on the merits of its claims. Indeed, it is common in practice for

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<sup>1</sup> See eg Secretary-General's remarks at Law of Sea conference and launch of UN Oceans Compact, 12 August 2012, in which he describes the Convention as ‘among the world’s most significant legal instruments’; available at <<https://www.un.org/sg/en/content/sg/statement/2012-08-12/secretary-generals-remarks-law-sea-conference-and-launch-un-oceans>> accessed 1 December 2016.

<sup>2</sup> United Nations Convention on the Law of the Sea (UNCLOS), Articles 279-299.

<sup>3</sup> AE Boyle, ‘Forum Shopping for UNCLOS Disputes relating to Marine Scientific Research’, in M Nordquist et al (eds), *Law, Science and Ocean Management* (Brill 2007) 523.

<sup>4</sup> This provision must be read in connection with, inter alia, Articles 287 and 288. See also the paper by Churchill in this special edition.

<sup>5</sup> Consent to dispute settlement is an axiomatic principle of the international legal order; see eg *Status of Eastern Carelia* (Advisory Opinion) *PCIJ Reports Series B, No. 5*, 27; *East Timor Case (Portugal v Australia)* [1995] ICJ Reports 90, para 26.

<sup>6</sup> See eg G Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume IV* (Stevens & Sons 1986) 432.

<sup>7</sup> UNCLOS, Article 288(1). In certain circumstances, the jurisdiction of a court or tribunal can be extended by virtue of Article 288(2).

respondents to resist litigation by arguing that the claims against it not fall within the scope of the compromissory clause in UNCLOS.<sup>8</sup>

This contribution to the special issue will focus on the three main arguments relating to jurisdiction *ratione materiae* that have been raised in order to avoid proceedings under the compulsory dispute settlement system of Part XV of UNCLOS.<sup>9</sup> Firstly, it will address arguments relating to the existence of a dispute. Secondly, it will consider arguments as to whether a dispute falls within the scope of UNCLOS. Thirdly, it will look at the question of whether the claims that pass these two hurdles can nevertheless be dismissed because they are predominantly concerned with the interpretation and application of other rules of law that fall outside the scope of UNCLOS. What all of these issues have in common is that they require courts and tribunals to scrutinize the scope and character of the claims that are advanced by litigants. In the words of the International Court of Justice (ICJ), these issues often require courts and tribunals to ‘isolate the real issue in the case and identify the object of the claim.’<sup>10</sup> This paper will explore how courts and tribunals have carried out this process when policing the limits of UNCLOS dispute settlement.

## **2. Determining the existence of a dispute**

The first question that arises for any court or tribunal acting under Part XV of UNCLOS is whether there is a dispute between the two parties to the litigation that can trigger the process of dispute settlement. The existence of a dispute is a pre-condition of Article 286, which derives from the judicial character of courts and tribunals and the fact that ‘[their] function ... is to state the law, but [they] may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.’<sup>11</sup> As noted by Schreuer, ‘far from being a purely academic issue, the existence vel non of a dispute can be decisive to determine a court’s or tribunal’s jurisdiction.’<sup>12</sup>

As a general matter, a dispute has been broadly defined by the Permanent Court of International Justice as ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’<sup>13</sup> This

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<sup>8</sup> See RR Churchill, ‘Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade’, in D Freestone et al (eds), *Law of the Sea: Progress and Prospects* (OUP 2006) 399.

<sup>9</sup> The paper will not address exceptions to jurisdiction, which are dealt with by other contributions to this special issue. See also discussion of the recent case law on this topic in N Klein, ‘Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions’ (2016) 15 *Chinese Journal of International Law* 403, 409-415.

<sup>10</sup> *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Reports 457, para 30.

<sup>11</sup> *Case concerning the Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Reports 15, 33-34.

<sup>12</sup> C Schreuer, ‘What is a Legal Dispute?’, in I Buffard, J Crawford, A Pellet, and S Wittich (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill 2008) 960.

<sup>13</sup> *Mavromattis Palestine Concessions (Greece v United Kingdom) (Preliminary Objections)* PCIJ Reports Series A, No 2, 11.

definition of a dispute has been followed in the context of UNCLOS dispute settlement for the purposes of interpreting and applying the compromissory clause in Article 286 and related provisions.<sup>14</sup> Yet, as will be seen below, this simple definition is not always easy to apply in practice.

It is generally accepted that the existence of a dispute is a question for objective determination<sup>15</sup>, meaning that it is not enough for one of the parties to assert that there is a dispute. In other words, there must be positive evidence of conflicting views or arguments.<sup>16</sup> The burden of proof rests with the applicant to demonstrate that a dispute does in fact exist, in line with the general rule that it is up to the party advancing a particular claim to prove it.<sup>17</sup> Nevertheless, it has been suggested that the threshold of establishing a dispute is a low one<sup>18</sup> and courts and tribunals should be flexible in the manner in which they treat this issue.<sup>19</sup> Not least, it has been pointed out that setting a high threshold has the potential to ‘undermine judicial economy and the sound administration of justice’ given that the applicant may simply be able to resubmit the claims at a later date when the dispute has further crystallized.<sup>20</sup> At the same time, the existence of a dispute cannot be taken for granted.

It is clear that as a preliminary matter, the applicant in UNCLOS litigation must first of all ‘proceed expeditiously to an exchange of views’ regarding the settlement of a dispute prior to the commencement of litigation.<sup>21</sup> This requirement suggests that some form of notification of a dispute is necessary for the purposes of UNCLOS. However, questions have arisen in relation to who is able to initiate such exchanges for the purposes of establishing the existence of a dispute at the international level. In the *M/V Norstar Case*, Italy received communications from a private Panamanian lawyer, beginning in August 2001, concerning the arrest of the Panamanian-flagged vessel. For its part, Italy argued that it had no way of knowing that this lawyer was acting on behalf of the Panamanian government and therefore these letters did not provide evidence of a dispute between the two states. In this respect, the Tribunal held that in principle ‘it is for each State to determine the persons, including private persons, who represent the State or are authorized to act on its behalf in its relations with other States’<sup>22</sup>, but it

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<sup>14</sup> See eg *Southern Bluefin Tuna Cases (Australia and New Zealand v Japan)* (Provisional Measures) [1999] ITLOS Reports 293, para 44; *M/V Norstar Case (Panama v Italy)* (Preliminary Objections) ITLOS Judgment, 4 November 2016, para 85.

<sup>15</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Reports 65, 74; see also *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Reports 319, 328; *Fisheries Jurisdiction Case (Spain v Canada)* [1998] ICJ Reports 432, paras 30-31.

<sup>16</sup> *Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Reports 70, para 30.

<sup>17</sup> See eg *Case concerning Pulp Mills on the River Uruguay (Uruguay v Argentina)* [2010] ICJ Reports 14, para 162 referring to the principle of *onus probandi incumbit actori*.

<sup>18</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections), ICJ Judgment, 5 October 2016, Dissenting Opinion of Judge Crawford, para 3. See also Schreuer (n12) 962.

<sup>19</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (n18) Dissenting Opinion of Judge Crawford, paras 3, 12. See also Dissenting Opinion of Judge Bennouna.

<sup>20</sup> *Ibid*, Dissenting Opinion of Vice-President Yusuf, para 24.

<sup>21</sup> UNCLOS, Article 283. See the discussion of this requirement by Bankes in his contribution to this special edition.

<sup>22</sup> *M/V Norstar Case* (n14) para 93.

went on to clarify that ‘for communications sent by a lawyer in private practice on behalf of a State to be opposable to another State, the latter needs to be duly informed of the authority conferred on the lawyer to represent the former State.’<sup>23</sup> It continued, ‘the mere reference in a letter by a private person to the authorization given to that person by the State may not be sufficient.’<sup>24</sup> It followed from the facts of the case that it was only from the time when Panama sent a note verbale to Italy in August 2004 confirming that Mr Carreyó was acting as its agent that Italy could be aware of the dispute between the two states.<sup>25</sup> This clarification concerning the nature in which a dispute under UNCLOS can be said to arise may prove to be important in future, given that several commentators have observed the increasing tendency for private law firms to act in UNCLOS dispute settlement proceedings.<sup>26</sup>

Given that the existence of a dispute cannot be deduced from the perspective of one party to the proceedings, important questions have also arisen concerning the significance to be ascribed to the actions of the respondent in determining whether a dispute exists. It is generally accepted that the respondent does not need to expressly acknowledge the existence of a dispute, but rather that this fact can be implied from its outright rejection of claims<sup>27</sup> or from other conduct.<sup>28</sup> Moreover, it has also been held that the respondent cannot deny the existence of a dispute by simply refusing to acknowledge the claims of another state.<sup>29</sup> In this respect, the ICJ noted in the *Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* that ‘the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.’<sup>30</sup> This decision was followed by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Norstar Case*, in which it held that Italy could not rely upon its silence to cast doubt on the existence of a dispute with Panama.<sup>31</sup> This is also in line with the case law under Article 283, recognizing that ‘a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching an agreement have been exhausted.’<sup>32</sup> Nevertheless, there may be circumstances in which the lack of a response can count as evidence that a dispute does not exist, for example where the initial communication was not

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<sup>23</sup> Ibid, para 94.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, para 96.

<sup>26</sup> See eg D Anderson, ‘Peaceful Settlement of Disputes under UNCLOS’, in J Barrett and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 414; MS Karim, ‘Litigating Law of the Sea Disputes using the UNCLOS Dispute Settlement System’, in N Klein (ed), *Litigating International Law Disputes: Weighing the Options* (CUP 2014) 260.

<sup>27</sup> See eg *East Timor Case* (n5) para 22.

<sup>28</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (n18) para 40.

<sup>29</sup> See eg *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Reports 28, para 38.

<sup>30</sup> *Case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n16) para 30.

<sup>31</sup> *M/V Norstar Case* (n14) para 101.

<sup>32</sup> *Mox Plant Case (Ireland v United Kingdom)* (Provisional Measures) [2001] ITLOS Reports 89, para 60.

sufficiently specific in nature that it did not indicate the existence of a legal dispute.<sup>33</sup>

Even if there is some evidence of a legal or factual dispute, it may also be necessary for the court or tribunal to determine the scope of the dispute before it. In principle, a dispute must already exist at the time at which the application is made to the court or tribunal<sup>34</sup> and it follows that ‘although statements made or claims advanced in or even subsequently to the Application may be relevant for various purposes – notably in clarifying the scope of the dispute submitted - they cannot create a dispute de novo, one that does not already exist.’<sup>35</sup> As a result, there must be at least an ‘incipient’<sup>36</sup> or ‘nascent’<sup>37</sup> dispute prior to the application being made in order to meet this threshold criterion. This will depend upon the precise facts of the case.

This issue arose obliquely in the *Chagos MPA Arbitration* where Mauritius had asked the Tribunal in its third submission to order the United Kingdom to refrain from taking steps that might prevent Mauritius from making a full submission to the Commission on the Limits of the Continental Shelf (CLCS) in relation to the Chagos archipelago. However, this submission was only raised in the course of the arbitral proceedings. The United Kingdom objected that the submission was inadmissible because there was no dispute between the parties at the time when the application was made. The Tribunal considered the history of the issue, which led it to agree with the United Kingdom that there was no dispute between the two parties in this respect.<sup>38</sup> In its view, the record of meetings between the two countries leading up to the litigation demonstrated a willingness to cooperate on making a submission to the CLCS. Nor was this conclusion undermined by the arguments advanced by the United Kingdom in the course of oral proceedings, which the Tribunal said had to be understood as a response to the new claims being made by Mauritius.<sup>39</sup>

The need to determine the scope of the dispute that is before a court or tribunal also arises when an applicant wishes to amend its claims in the process of litigation. At the outset, the relevant rules of procedure require the applicant to expressly state the legal basis of its claims. Thus, Article 24 of Annex VI of the Convention provides that a written application to ITLOS

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<sup>33</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (n18) para 49: ‘a statement can give rise to a dispute only if it refers to the subject-matter of a claim with sufficient clarity to enable the State against which that claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.’

<sup>34</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections), ICJ Judgment, 17 March 2016, para 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n16) para 30.

<sup>35</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (n18) para 54.

<sup>36</sup> *Ibid*, Dissenting opinion of Judge Crawford, para 26.

<sup>37</sup> *Ibid*, Dissenting opinion of Judge Sebutinde, para 15.

<sup>38</sup> *Chagos MPA Arbitration (Mauritius v United Kingdom)* (Jurisdiction and Merits) Annex VII Tribunal Award, 18 March 2015, para 349.

<sup>39</sup> *Ibid*, para 348.

must indicate 'the subject matter of the dispute.' This provision is supplemented by Article 54(2) of the ITLOS Rules of Procedure, which provides that 'the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of facts and grounds on which the claim is based.' Identical language is found in the Rules of the ICJ.<sup>40</sup> Although using slightly different language, a similar effect is achieved by Article 1 of Annex VII, which provides that a notification of arbitration 'shall be accompanied by a statement of claim and the grounds on which it is based.' The rationale behind these various rules of procedure is to ensure that the respondent has the opportunity to know the contours of the case against it at the outset and implementation of these rules has been emphasized as 'essential from the point of view of legal security and the good administration of justice.'<sup>41</sup>

Of course, a party is able to modify their pleadings as the case proceeds. However, the ICJ has confirmed that there are limits to this ability: 'the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably ... [but], it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character.'<sup>42</sup> In practice, this requirement translates into a test as to whether any new or amended claims were implicit in the original claims<sup>43</sup>, which in turn begs the question of what the scope of the original dispute was. Similar principles apply to UNCLOS dispute settlement.<sup>44</sup> Thus, in the *M/V Louisa Case*, Spain was not allowed to introduce claims relating to Article 300 during the course of the proceedings because it had the effect of 'generat[ing] a new claim in comparison to the claims presented in the Application.'<sup>45</sup> This case thus demonstrates the willingness of courts and tribunals to police these rules in order to ensure that dispute settlement procedures are not abused.

It is worth noting that such requirements are not only aimed at protecting the rights of the respondent, but they have a broader objective of ensuring that the potential interests of third parties are also respected.<sup>46</sup> This latter consideration is particularly pertinent in the context of a widely accepted multilateral treaty, such as UNCLOS. Moreover, it implies a significant limitation on the role of a court or tribunal because it means that the court or tribunal may not be able to hear a claim, even if the two parties agree thereto.<sup>47</sup> As noted by the ICJ in this connection, '[t]here may ... be an incompatibility between the desires of an applicant, or, indeed of both of the

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<sup>40</sup> ICJ Rules of Procedure, Article 38(1).

<sup>41</sup> *M/V Louisa Case (Saint Vincent and the Grenadines v Spain)* [2013] ITLOS Reports 4, para 148.

<sup>42</sup> *Société Commerciale de Belgique Case* [1939] PCIJ Reports, Series A/B, 160.

<sup>43</sup> See eg *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Reports 240, para 65; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* [2007] ICJ Reports 659, para 108.

<sup>44</sup> *M/V Louisa Case* (n41) para 147.

<sup>45</sup> *Ibid*, para 142.

<sup>46</sup> *Société Commerciale de Belgique Case* (n42) 173.

<sup>47</sup> *Northern Cameroons Case* (n11) 29.

parties to a case, on the one hand, and on the other hand, the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity...'

### **3. The limits of subject-matter jurisdiction**

Given the limited scope of the compromissory clause in UNCLOS, it is not sufficient that there is merely a legal or factual dispute between the parties - there must also be a dispute within the agreed limits of jurisdiction. For present purposes, this means that there has to be a 'dispute concerning the interpretation and application of the Convention.'<sup>48</sup> The generality of many UNCLOS provisions means that applicants could potentially try to fit all manner of issues within the framework of the Convention and it is thus up to courts and tribunals to determine whether claims really implicate rights and obligations under UNCLOS at all. Such questions relating to subject-matter jurisdiction are questions of law for the determination of the court or tribunal in pursuit of its *compétence de la compétence*.<sup>49</sup> Thus, it is not sufficient for a court or tribunal to 'limit itself to noting that one of the Parties maintains that the [treaty] applies, while the other denies it.'<sup>50</sup> Rather, it is for the court or tribunal to ascertain for itself that the acts complained of are capable of being addressed by the treaty provisions that have been invoked. This has been termed by one eminent judge as a question of 'the application of a treaty.'<sup>51</sup>

The *M/V Louisa Case* provides a leading example of the scope of UNCLOS dispute settlement being tested in this manner. This was a case concerning the detention of the *M/V Louisa* and its crew on charges of unlawfully collecting underwater cultural artifacts within Spanish waters, whilst purportedly conducting seafloor surveys intended to locate oil and gas deposits in the territorial sea and internal waters of Spain. The arrest took place when the vessel was voluntarily docked at the port of El Puerto de Santa Maria in Spain. Saint Vincent and the Grenadines, as the flag state, alleged that the actions of Spain constituted a violation of various provisions of UNCLOS, namely Articles 73, 87, 226, 227 and 303. Even though Saint Vincent and the Grenadines had invoked certain provisions of the Convention, Spain objected that this was not really an UNCLOS dispute at all. In addressing this argument, the ITLOS confirmed that it was necessary to 'establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines.'<sup>52</sup> In the case at hand, the Tribunal concluded that Saint Vincent and the Grenadines had not satisfied this threshold

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<sup>48</sup> UNCLOS, Articles 286 and 288(1).

<sup>49</sup> UNCLOS, Article 288(4).

<sup>50</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures), ICJ Order, 7 December 2016, para 47.

<sup>51</sup> See *Oil Platforms Case (Iran v United States of America)* (Preliminary Objections) [1996] ICJ Reports 803, Separate Opinion of Judge Higgins, paras 4-5.

<sup>52</sup> *M/V Louisa Case* (n41) para 99.



requirement because the various provisions invoked by it, and its interpretations thereof, could not 'serve as a basis for the claims submitted.'<sup>53</sup> In other words, there may have been a dispute between Saint Vincent and the Grenadines and Spain, but it did not implicate any of the provisions of UNCLOS.<sup>54</sup> It is worth noting that the Tribunal reached this conclusion despite the fact that it had previously found that it had *prima facie* jurisdiction for the purposes of ordering provisional measures.<sup>55</sup> As explained by Judge Paik in his Separate Opinion:

'The methodology and the standard of appreciation to be applied for a definitive finding of jurisdiction cannot be identical with those for a *prima facie* finding. While "plausible connection" may be enough for *prima facie* jurisdiction, it falls short for the present case, in which a definitive finding on the Tribunal's jurisdiction must be made. It should surprise no one that different standards for a jurisdictional link can lead to different conclusions.'<sup>56</sup>

It is important to point out that the finding of the Tribunal in this case is expressed in terms of jurisdiction.<sup>57</sup> The character of this finding largely derives from the fact that the Tribunal was considering the potential applicability of the Convention to the evidence that have been pleaded by Saint Vincent, but it did not make any decision relating to the veracity of that evidence. In other words, it did not enter into the merits of whether there had been a violation of the relevant provisions. Nevertheless, this decision does rest upon a definitive finding relating to the interpretation of the Convention and so it is not completely separate from the merits of the case.

It is also possible for a respondent to raise the lack of subject-matter jurisdiction as a preliminary objection.<sup>58</sup> The making of a preliminary objection has the effect of suspending proceedings on the merits until a decision is rendered on the objections.<sup>59</sup> This is an important procedural right for the respondent in order to avoid lengthy and costly proceedings in a case that ultimately has no jurisdictional basis. In other words, it is an important

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<sup>53</sup> Ibid, paras 105, 109, 113, 117, 119.

<sup>54</sup> As noted by Churchill, 'if St. Vincent did have a case, it was not a law of the sea case, but a human rights case'; RR Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2013' (2015) 30 *International Journal of Marine and Coastal Law* 1, 10.

<sup>55</sup> *M/V Louisa Case (Saint Vincent and the Grenadines v Spain)* (Provisional Measures) [2008-2010] ITLOS Reports 58, para 69. The Order also made clear that it did not prejudge the question of jurisdiction on the merits; *ibid*, para 46

<sup>56</sup> Ibid, Separate Opinion of Judge Paik, para 18.

<sup>57</sup> Ibid, para 160(1).

<sup>58</sup> It should be noted that an additional procedure for challenging the validity of claims related to the exercise of sovereign rights or jurisdiction in the EEZ applies by virtue of Article 294, which introduces an expedited procedure to request claims to be struck out where they constitute 'an abuse of legal process' or they are 'prima facie unfounded.' This provision was introduced at the bequest of coastal states who were concerned about vexatious litigation. See S Rosenne and LB Sohn (eds), *United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume V* (Martinus Nijhoff 1989) 76-78. The threshold for rejecting a case under this provision would appear to be a high one, however. In the *South China Sea Arbitration*, the Tribunal refused to invoke Article 294 using its proprio motu powers, saying that 'In light of the serious consequences of a finding of abuse of process or *prima facie* unfoundedness, the Tribunal considers that the procedure is appropriate in only the most blatant cases of abuse or harassment' *South China Sea Arbitration (Philippines v People's Republic of China)* (Jurisdiction and Admissibility), Annex VII Arbitration Award, 29 October 2015, para 128.

<sup>59</sup> Ibid.

mechanism for policing the limits of subject-matter jurisdiction. At the same time, it raises complex issues because a decision on the correct interpretation to be given to the Convention and its potential applicability to the case must be made before all the evidence and arguments have been advanced by the parties. A question arises in this context of whether a court or tribunal should give a definitive answer regarding subject-matter jurisdiction at this stage<sup>60</sup>, or whether it should simply ask whether the claims ‘reasonably relate to ... the legal standards of the treaty in point.’<sup>61</sup>

The *M/V Norstar Case* provides an example where the respondent made a preliminary objection that the claims advanced by the applicant fell outside the subject-matter jurisdiction of the Tribunal. The case had been initiated by Panama, as the flag state of the *M/V Norstar*, which claimed in its Application that the arrest of the tanker by Italy had violated Articles 33, 73, 87, 111, 226 and 300 of the Convention. Italy argued that these provisions were simply not applicable to the facts of the case. Panama subsequently withdrew its claims in relation to Articles 73 and 226 in the course of the oral proceedings<sup>62</sup>, leaving the Tribunal to determine the applicability of the remaining provisions to the facts of the case. On the basis of the evidence before it, the Tribunal held that Articles 33 and 58 had no bearing on the facts because they were applicable to maritime zones that were not relied upon by Italy in the exercise of its powers.<sup>63</sup> It therefore had no jurisdiction over these claims. In contrast, the Tribunal accepted that ‘article 87 is relevant to the ... case’<sup>64</sup> According to the Tribunal, the actions complained of ‘may be viewed as an infringement of the rights of Panama under article 87.’<sup>65</sup> Moreover, to the extent that Panama claimed that Italy had failed to fulfill its obligations under article 87 in good faith, article 300 was also ‘relevant.’<sup>66</sup> These matters will therefore proceed to the merits.

One criticism of the judgment on this point is that the standard of appreciation that is applied by the Tribunal is not very clear.<sup>67</sup> Indeed, Judge ad hoc Treves goes further in his dissenting opinion by suggesting that the test applied by the Tribunal was more akin to the test applicable to prima facie jurisdiction, rather than a test that should be applied in an authoritative finding on jurisdiction. He thus calls for ‘a more severe test’ in this context.<sup>68</sup> Judges Wolfrum and Attard were also concerned that the Tribunal did not apply a sufficiently robust threshold for ascertaining that Article 87 was

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<sup>60</sup> See *Oil Platforms Case* (n51) Separate Opinion of Judge Higgins.

<sup>61</sup> *Southern Bluefin Tuna Arbitration (Jurisdiction and Admissibility) (SBT Award)*, Annex VII Arbitration Award, 4 August 2000, para 48. It continued, ‘in the instant case, it is for this Tribunal to decide whether the “real dispute” between the Parties does or does not reasonably (and not just remotely) relate to the obligations set forth in the treaties whose breach is alleged.’

<sup>62</sup> See *M/V Norstar Case* (n14)) para 108.

<sup>63</sup> *Ibid*, paras 114 and 116.

<sup>64</sup> *Ibid*, para 122.

<sup>65</sup> *Ibid*, para 122.

<sup>66</sup> *Ibid*, para 132.

<sup>67</sup> *Ibid*, Joint Separate Opinion of Judges Wolfrum and Attard, para 5.

<sup>68</sup> *Ibid*, Dissenting Opinion of Judge ad hoc Treves, para 13. He continues, ‘such a test should not have been limited to the arguments of the parties. In matters of jurisdiction, the Tribunal must be satisfied that it has jurisdiction.’

applicable to the facts as pleaded.<sup>69</sup> Underpinning these opinions is the idea that a court or tribunal must not neglect its important function of screening out inappropriate claims. However, Judges Wolfrum and Attard also appear to acknowledge that the facts available to the Tribunal in the preliminary objections proceedings may not have been sufficient to make a definitive decision at this point in time.<sup>70</sup> This observation underlines the complexities of dealing with preliminary objections to subject-matter jurisdiction.

One way to deal with this situation would be to utilise the power contained in the relevant rules of procedure to refuse to give judgment on a preliminary objection by declaring that ‘the objection does not possess, in the circumstances of the case, an exclusively preliminary character.’<sup>71</sup> <sup>72</sup> It must be acknowledged that there is a risk to utilizing this power because it prolongs the proceedings and it adds to the costs of litigation. Indeed, it has been suggested that this power should be used sparingly. For example, Judge Bennouna argued in the *Case concerning the Duty to Negotiate Access to the Pacific Ocean* that ‘it is only in exceptional circumstances that the Court may find that an objection does not possess an exclusive preliminary character, where it does not have all the elements required to make a decision, or where such a decision would prejudge the dispute, or some aspects thereof, on the merits.’<sup>73</sup> This point of view is supported by the drafting history of the relevant article of the ICJ Rules of Procedure, which were later used as the basis for the ITLOS Rules of Procedure. It is generally accepted that the rule was drafted in such a way as to ‘limit the exercise of [the power to examine a preliminary objection in the merits phase] by laying down the conditions more strictly.’<sup>74</sup> The ICJ has even gone as far as saying that ‘in principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objections would determine the dispute, or some elements thereof, on the merits.’<sup>75</sup> Yet, any such principle may be easily outweighed in relation to an objection to the subject-matter jurisdiction of a court or tribunal. As once explained by Judge Cançado Trindade, ‘a preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione*

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<sup>69</sup> See also Joint Separate Opinion of Judges Wolfrum and Attard, para 6: ‘In our view the standard of appreciation applied by the Judgment does not even meet the *prima facie* standard of appreciation in provisional measures proceedings.’

<sup>70</sup> Ibid, Joint Separate Opinion of Judges Wolfrum and Attard, paras 3 and 43. See also the Dissenting Opinion of Judge *ad hoc* Treves, para 18.

<sup>71</sup> ITLOS Rules of Procedure, Article 97(6); ICJ Rules of Procedure, Article 79(7). Similar provisions are sometimes found in the rules of procedure adopted for Annex VII arbitral tribunals; see e.g. Rules of Procedure in the South China Sea Arbitration, Article 20(3); Arctic Sunrise Arbitration, Rules of Procedure, Article 20(3).

<sup>72</sup> Judges Wolfrum and Attard hint that they may have preferred this solution; see Joint Separate Opinion, para 3.

<sup>73</sup> *Case concerning the Duty to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Preliminary Objections), ICJ Judgment, 24 September 2015, Separate Opinion of Judge Bennouna.

<sup>74</sup> *Lockerbie Case (Libya v United Kingdom)* (Preliminary Objections) [1998] ICJ Reports 9, para 49. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Reports 1, para 41: ‘This approach tends to discourage the unnecessary prolongation of proceedings at the jurisdictional phase.’

<sup>75</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections) [2007] ICJ Reports 832, para 51. See also *Military and Paramilitary Activities in and against Nicaragua* (n74) para 41. Previously, such decisions had been made as a matter of discretion taking into account ‘the good administration of justice’; see *Panevezys-Saldutiskis Railway Case (Estonia v Lithuania)* (Preliminary Objections) [1939] PCIJ Reports Series A/B, No 29, 53, 56.

personae or ratione temporis.<sup>76</sup> In light of this observation, it is perhaps unsurprising that many UNCLOS tribunals have in practice classified decisions on whether or not a claim falls to be decided under the Convention as not having an exclusively preliminary character, thus avoiding having to take a position in the preliminary proceedings.<sup>77</sup>

#### **4. Subject-matter Jurisdiction and Admissibility of Claims in Mixed Disputes**

Rarely do law of the sea disputes raise questions about the interpretation and application of UNCLOS alone. The broad and general nature of the obligations found in UNCLOS mean that there is often what has been called 'a parallelism of treaties'<sup>78</sup>, where a controversy between two states in fact touches upon questions concerning the interpretation and application of more than one treaty. Similarly, a dispute concerning the interpretation and application of UNCLOS may also simultaneously raise issues under the rules of customary international law. What are the consequences of this situation for the exercise of jurisdiction by a court or tribunal acting under Part XV of UNCLOS?

It has been made clear by several courts or tribunals that the fact that the dispute raises issues under other rules of international law, either treaty or custom, would not prevent them in principle from exercising jurisdiction in relation to an UNCLOS dispute. For example, the Tribunal in the *MOX Plant Arbitration* held that the fact that other treaties were relevant to some of the issues raised by the claims did not 'alter the character of the dispute as one essentially involving the interpretation and application of [UNCLOS]'.<sup>79</sup> In this case, the Arbitral Tribunal emphasized the distinct identity of obligations under the parallel treaties, noting that that 'even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in [UNCLOS], the rights and obligations under those agreements have a separate existence from those under [UNCLOS]'.<sup>80</sup> Thus, the Tribunal emphasized the severability of the different aspects of the dispute, meaning it can deal with those parts of the dispute that do fall within its jurisdiction *ratione materiae*.

A similar issue arose in the *South China Sea Arbitration*, where China argued in its position paper, which was treated as a plea on jurisdiction by the Tribunal, that 'the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is

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<sup>76</sup> *Case concerning the Duty to Negotiate Access to the Pacific Ocean* (n73) Separate Opinion of Judge Cançado Trindade, para 6.

<sup>77</sup> See eg *Chagos MPA Arbitration*, Annex VII Arbitral Tribunal Procedural Order No 2, 15 January 2013; *Duzgit Integrity Arbitration (Malta v Sao Tome and Principe)* Annex VII Arbitral Tribunal Award, 24 August 2015, para 19. See also *South China Sea Arbitration* (n58) para 413(H).

<sup>78</sup> *Southern Bluefin Tuna Arbitration* (n61) para 52.

<sup>79</sup> *MOX Plant Case (Ireland v United Kingdom)* Annex VII Arbitral Tribunal Order No 3, 24 June 2003, para 18.

<sup>80</sup> *Ibid*, para 50.

beyond the scope of the Convention and does not concern the interpretation and application of the Convention.’<sup>81</sup> In its analysis, the Tribunal agreed that there was a dispute over sovereignty, but, on the basis of the facts, it went on to hold that the Philippines had identified a number of separate questions concerning the interpretation and application of UNCLOS. When it came to characterizing these claims, the Tribunal rejected the view that sovereignty claims were implicit in the submissions of the Philippines.<sup>82</sup> It expressly noted that it was ‘fully conscious of the limits on the claims submitted to it and ... intends to ensure that its decision neither advances nor detracts from either Party’s claims to land sovereignty in the South China Sea.’<sup>83</sup>

On the basis of this jurisprudence, one author concludes that ‘if an applicant state can make out a plausible case that a dispute involves the interpretation and application of [UNCLOS], the court or tribunal concerned will have jurisdiction, notwithstanding the fact that the dispute may also relate to the interpretation and application of another treaty.’<sup>84</sup> There is a large degree of truth in this statement. Yet, more recent case law suggests that there may be more complex situations. In particular, the result may differ if a decision on a claim under UNCLOS requires the prior determination of a claim under another independent rule of international law.<sup>85</sup>

In principle, courts or tribunals are able to apply other sources of law that may be necessary to determine disputes under the Convention.<sup>86</sup> To this end, Article 293 of UNCLOS expressly provides that ‘a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.’ Moreover, in the *Chagos MPA Arbitration*, the Tribunal explicitly held that ‘the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such ... ancillary determinations of law as are necessary to resolve the dispute presented to it.’<sup>87</sup> Yet, the Tribunal went on to suggest that there may be a significant caveat to this assertion. In this case, the Tribunal was faced with claims concerning certain actions taken by the United Kingdom in relation to the Chagos archipelago, a group of islands in the Indian Ocean over which both the United Kingdom and Mauritius claim sovereignty. In its Application, Mauritius asserted that the United Kingdom had violated UNCLOS by declaring a marine protected area in the waters surrounding the Chagos archipelago when it was not the coastal state. This case is therefore an

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<sup>81</sup> *South China Sea Arbitration* (n58) para 133.

<sup>82</sup> In determining the nature of the claim, the Tribunal not only drew upon the formal arguments of the parties, but also on ‘diplomatic exchanges, public statements, and other pertinent evidence.’ The Tribunal also noted the importance of distinguishing between ‘the dispute itself and the arguments used by the parties to sustain their respective submissions on the dispute.’

<sup>83</sup> *South China Sea Arbitration* (n58) para 153.

<sup>84</sup> Churchill (n8) 401.

<sup>85</sup> What has been called elsewhere, an ‘indispensible issue’; see P Tzeng, ‘The Doctrine of Indispensible Issues: Mauritius v United Kingdom, Philippines v China, Ukraine v Russia, and Beyond’, EJIL Talk!, 14 October 2016, <<http://www.ejiltalk.org/the-doctrine-of-indispensible-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/>> accessed 15 November 2016.

<sup>86</sup> See eg J Harrison, ‘Judicial Law-Making and the Developing Order of the Oceans’ (2007) 22 *International Journal of Marine and Coastal Law* 283, 299; M Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (2007) 22 *International Journal of Marine and Coastal Law* 351.

<sup>87</sup> *Chagos MPA Arbitration* (n38) para 220.

example of what has been termed in some of the literature as a ‘mixed dispute.’<sup>88</sup>

On the face of it, the relevant claims raised by Mauritius did involve ‘the interpretation and application’ of UNCLOS. More precisely, the Tribunal was being asked, *inter alia*, to interpret and apply the phrase ‘coastal state’ in Articles 2, 55, 56 and 76. At the same time, these claims were also obviously part of a broader dispute between the parties.<sup>89</sup> It was on this basis that the UK objected to jurisdiction, arguing that the Mauritian claims were ‘an artificial re-characterisation of the long-standing sovereignty dispute’ in a manner to attempt to bring it within the scope of UNCLOS.<sup>90</sup> The Arbitral Tribunal was thus required to deal with the proper characterization of the dispute.

The Tribunal did not deny that there were different strands to the dispute.<sup>91</sup> In determining this objection to jurisdiction, the Tribunal noted that it was necessary to ‘[evaluate] where the relative weight of the dispute lies’<sup>92</sup> and determine whether the dispute is fundamentally one that raises substantial issues under the Convention or whether the Convention is merely ‘incidental’ to the sovereignty dispute.<sup>93</sup> According to the Tribunal, this must be determined on an objective basis.<sup>94</sup> Previous jurisprudence of the ICJ in the *Nuclear Tests Case* and the *Fisheries Jurisdiction Case* was invoked by the Tribunal as a means for looking beyond the pleadings in order to determine the real character of the dispute.<sup>95</sup> In particular, the Tribunal stressed that it was ‘obliged to consider the context of the submission and the manner in which it has been presented in order to establish the dispute actually separating the Parties.’<sup>96</sup>

On the facts of the case, the majority of the Tribunal held that the dispute was ‘properly characterized as relating to land sovereignty over the Chagos Archipelago’ and ‘the parties’ differing views on the “coastal State” for the purposes of the Convention are simply one aspect of this larger dispute.’<sup>97</sup> In reaching this conclusion, it noted that the arguments under UNCLOS were relatively recent in origin compared to the broader

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<sup>88</sup> The term ‘mixed dispute’ is used, for example, by M Nordquist et al (eds), *The United Nations Convention on the Law of the Sea 1982 – A Commentary, Volume V* (Martinus Nijhoff Publishers 1989) 117. See also I Buga, ‘Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals’ (2012) 27 *International Journal of Marine and Coastal Law* 59-95.

<sup>89</sup> As explained by Karim, there was no other forum to settle the wider dispute as the parties had made their acceptance of the compulsory jurisdiction of the ICJ subject to a reservation for disputes with another member of the Commonwealth; see Karim (n26) 274.

<sup>90</sup> *Chagos MPA Arbitration* (n38) para 207.

<sup>91</sup> See *ibid*, paras 209-211.

<sup>92</sup> *Ibid*, para 211. See also para 229.

<sup>93</sup> *Ibid*, para 220: ‘where the “real issue in the case” and the “object of the claim” do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).’

<sup>94</sup> *Ibid*, para 208.

<sup>95</sup> *Ibid*, para 208.

<sup>96</sup> *Ibid*, para 229.

<sup>97</sup> *Ibid*, para 212. The Tribunal used similar reasoning to dismiss related claims about the status of the Mauritius as a coastal state; *ibid*, para 229.

sovereignty issues.<sup>98</sup> The Tribunal also took particular account of the consequences of deciding the claim.<sup>99</sup> In this context, the Tribunal was keen to stress the 'inherent sensitivity of States to questions of territorial sovereignty.'<sup>100</sup> Thus, the majority concluded that there was only an 'incidental connection' between the real dispute and the matters regulated by UNCLOS and this nexus was insufficient to justify the exercise of jurisdiction over the claims.<sup>101</sup>

It would appear that this balancing test confers a degree of discretion on the court or tribunal in order to decide whether the nexus between the claims and the Convention is sufficiently strict. For example, Talmon argues that 'any evaluation of where the "relative weight" of a dispute lies is an inherently subjective exercise.'<sup>102</sup> This is further supported by the manner in which the Tribunal frames the question to be answered:<sup>103</sup>

'Is the Parties' dispute *primarily* a matter of the interpretation and application of the term "coastal State", with the issue of sovereignty forming one aspect of a larger question? Or does the Parties' dispute *primarily* concern sovereignty, with the United Kingdom's actions as a "coastal State" merely representing a manifestation of that dispute?'

If one accepts this understanding of the test, it would appear that different courts and tribunals may take divergent views on this issue. Indeed, even in this case, the reasoning of the Tribunal on this point was subject to a joint dissenting opinion by Wolfrum and Kateka, who argued that the Tribunal had not paid sufficient attention to the careful wording of the first and second submissions of Mauritius.<sup>104</sup> For these two arbitrators, the dispute was properly characterized as relating to the interpretation and application of UNCLOS and thus the Tribunal had denied Mauritius the right to bring claims that legitimately fell within the scope of UNCLOS.

The discretionary element of the test would appear to find further support in the fact that even the majority accepted that some mixed disputes may sometimes be submitted to UNCLOS dispute settlement. In a significant obiter dictum, the Tribunal noted that they were not willing to 'categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.'<sup>105</sup> Any distinction between major and minor issues of territorial sovereignty is not one that can be the subject of a strict test, but

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<sup>98</sup> Ibid, para 211.

<sup>99</sup> Ibid, para 211.

<sup>100</sup> Ibid, para 216.

<sup>101</sup> Ibid, para 220.

<sup>102</sup> S Talmon, 'The Chagos Marine Protected Area Arbitration: A Case Study of the Creeping Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65 *International and Comparative Law Quarterly* 927, 933-934.

<sup>103</sup> *Chagos MPA Arbitration* (n38) para 211.

<sup>104</sup> See *ibid*, Partial Dissenting Opinion of Judge Wolfrum and Kateka, para 17. See also paras 19, 45 and 47.

<sup>105</sup> Ibid, para 221.

must be determined by a Tribunal exercising a degree of discretion in its assessment of the evidence before it.

This latter consideration also suggests that the Tribunal is - contrary to what it says in the *dispositif*<sup>106</sup> - in fact concerned with the admissibility of the claims, rather than a strict question of jurisdiction. All of its reasons pertain to the appropriateness or propriety of dealing with the claims, which is usually understood as a question of admissibility.<sup>107</sup> Indeed, it may also be easier to justify the scope for discretion in the context of admissibility<sup>108</sup> than it is in relation to jurisdiction, which, after all, is concerned primarily with the consent of the parties.

## **5. Conclusion**

There is no doubt that compulsory dispute settlement is a fundamental feature of UNCLOS. The Convention is unlikely to have been concluded without some guarantee that questions concerning its implementation would be able to be resolved by an independent adjudicator. Yet, Part XV of the Convention does not necessarily provide a panacea for addressing all maritime problems. By its very nature, UNCLOS established a system of limited subject-matter jurisdiction and it follows that there are a number of thresholds that must be met before claims can be settled using the UNCLOS procedures. This paper has considered the manner in which courts and tribunals acting under Part XV of UNCLOS have dealt with questions concerning the precise scope of their subject-matter jurisdiction. With this in mind, the paper addressed the main issues that have arisen in this context, explaining the key features of the jurisprudence and the factors that are taken into account by courts and tribunals in determining their jurisdiction.

Whilst the legal basis for compulsory dispute settlement may lie in the consent of the parties, it is courts and tribunals that ultimately wield a significant amount of power to decide whether or not a particular dispute can proceed to a decision on the merits. Indeed, there would appear to be some flexibility inherent in deciding these threshold issues, exemplified by the manner in which courts and tribunals identify the existence of a dispute or the way in which they characterize claims of the parties for the purposes of establishing subject-matter jurisdiction.

The critical role of courts and tribunals in this context is perhaps demonstrated most powerfully by the *Chagos MPA Arbitration*, in which the Tribunal employed a preponderance test in order to decide whether to entertain the claims advanced by Mauritius. In this case, they determined that two key aspects of the submissions could not proceed to the merits, because

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<sup>106</sup> Ibid, para 547(A)(1).

<sup>107</sup> J Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn: CUP 2012) 693. See also R Kolb, *The International Court of Justice* (Hart Publishing 2013) 201.

<sup>108</sup> S Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume II* (4<sup>th</sup> edn, Martinus Nijhoff Publishers 2006) 532-533.



there was not a sufficient connection to UNCLOS. This approach introduces a significant degree of flexibility into determining the contours of which disputes may be submitted to UNCLOS dispute settlement and it leaves such questions to be decided on a case-by-case basis. Indeed, the Award is explicitly drafted in order to leave the door ajar for ‘minor territorial disputes’ to be treated as an integral part of an UNCLOS dispute. The question of what is a minor territorial dispute will doubtless be subject to litigation in the future.<sup>109</sup> Nor is it only mixed disputes raising related questions of territorial sovereignty that may present this problem; disputes under overlapping treaties may in some circumstances also raise questions about where the preponderance of the dispute lies.<sup>110</sup>

How courts and tribunals use their inherent judicial powers to delimit the existence of a dispute or to determine which claims are suitable for settlement through the UNCLOS procedures reveals a lot about their perceptions of the function and importance of dispute settlement under the Convention. The fact that disagreements have arisen in many of these cases illustrates the divisive nature of this issue. Yet, the importance of these questions also cannot be understated. How courts and tribunals make such decisions will ultimately dictate the scope of subject-matter jurisdiction under UNCLOS<sup>111</sup> with repercussions for all States Parties to the Convention, as well as the overall legitimacy of the UNCLOS dispute settlement system.<sup>112</sup> One consequence of this observation is that courts and tribunals cannot be guided solely by the arguments of the parties in a particular case, but they must also take into account the broader systemic concerns that could inform their decision.

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<sup>109</sup> DA Colson and BJ Vohrer, ‘In re Chagos Marine Protected Area (Mauritius v. United Kingdom) (2015) 109 *American Journal of International Law* 845, 851. See also Tzeng (n85) noting that this issue is likely to arise in the arbitration pending between Ukraine and the Russian Federation.

<sup>110</sup> An example may be provided by the *Southern Bluefin Tuna Arbitration* (n61). Although this arbitration was disposed on alternative grounds, the Tribunal did expressly say that ‘the Parties to this dispute ... are the same Parties grappling with not two separate disputes but what is in fact a single dispute arising under both Conventions’; *ibid*, para 54. Following the approach in the *Chagos MPA Arbitration*, the Tribunal could have found that the claims under UNCLOS were inadmissible, if they considered that the dispute arose predominantly under the Convention on the Conservation of Southern Bluefin Tuna, rather than under UNCLOS.

<sup>111</sup> *Ibid*.

<sup>112</sup> Making this point in a different context, see eg AD Sofaer, ‘The Philippine Law of the Sea Action against China: Relearning the Limits of International Adjudication’ (2016) 15 *Chinese Journal of International Law* 393, 400-401.